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No. 84-678

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM 1984

R. J. WOLF,
Petitioner,

VS.

BANCO NACIONAL DE MEXICO, S.A.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED*

In concluding that the peso-denominated certificates of deposit/time deposit accounts issued to petitioner by respondent Banco Nacional de Mexico, S.A. ("Banamex") in the ordinary course of banking business, repayment of which accounts was virtually guaranteed by Mexican banking regulations, were *not* securities within the meaning of the Securities Act of 1933, did the United States Court of Appeals for the Ninth Circuit:

1. Properly conclude that the test articulated by the Supreme Court in *Marine Bank v. Weaver*, 455 U.S. 551 (1982) governed this case;
2. Properly apply that test to the facts of this case; and
3. Even if the *Marine Bank* test does not govern this case, reach a result consistent with other applicable definitional tests.

PARTIES TO THE PROCEEDINGS

Petitioner R. J. Wolf and respondent Banco Nacional de Mexico, S.A. ("Banamex") are the only parties to these proceedings. The following entities appeared as *amici curiae* in the Ninth Circuit: Federal Deposit Insurance Corporation; Securities and Exchange Commission; Institute of Foreign Bankers; and Mexican Banking and Financial Institutions and Organismo de Coordinacion de la Banco Mexicana.

*These questions have been restated from those set forth in the Petition.

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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit (opinion by Judge Duniway, unanimously joined by Judges Wallace and Pregerson) was rendered on review of an interlocutory order of the district court pursuant to 28 U.S.C. § 1292(b). While the Court of Appeals' decision disposes of petitioner's claims against Banamex under the federal securities laws, petitioner's claims for common law fraud and violation of California's state securities laws remain pending in the district court. As set forth in greater detail below, the Court of Appeals' decision rests on the straightforward

— and correct — application of this Court's prior decisions and the federal securities laws. As a result, and based on the additional confluence of factors set forth hereafter, the Court of Appeals' decision does not present the extraordinary circumstances which are required for review of a non-final, interlocutory judgment under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On May 10, 1982, petitioner R. J. Wolf filed a complaint against Banco Nacional de Mexico, S.A. ("Banamex") in the United States District Court for the Northern District of California. The complaint alleged, among other things, that Banamex had violated the federal securities laws in connection with three Banamex time deposit accounts which he had opened in a Tijuana, Mexico branch of Banamex.

At the time petitioner made his deposits and at the time he brought the suit, Banamex was a private banking institution organized and incorporated (in 1884) under the laws of Mexico.¹ Banamex has had an uninterrupted history of trouble-free service to its customers throughout the world. It is one of the largest commercial banking institutions in Latin America, having more than 550 branches throughout Mexico and maintaining overseas agencies or offices in London, Madrid, Paris, Frankfurt, Tokyo, New York, and Los Angeles. As of December 31, 1981, Banamex was the 106th largest bank in the world, with assets over 17 billion U.S. dollars.

¹On September 1, 1982, Banamex and all other Mexican banks were nationalized. Pursuant to the Bank Nationalization Decree, Banamex became, and still remains, a wholly-owned agency or instrumentality of the Mexican government.

Petitioner is a California resident, licensed as an attorney to practice law before all courts in that State and in the State of Minnesota.

In the district court, petitioner claimed that sometime prior to August 1981 he read some unspecified advertising or article about Banamex in an unidentified newspaper or periodical. On August 5, 1981, petitioner sent a letter to Banamex's Tijuana, Mexico branch indicating that he was interested in opening an account with Banamex and requesting that Banamex send him information on such accounts. Thereafter, from Tijuana, Banamex sent petitioner the information he had requested, including a brochure entitled "Mexico's Other Great Climate . . . Investments."²

²The types of deposit accounts described in the brochure, which was written in English, included peso-denominated time deposits and dollar savings accounts. Peso time deposits carried the highest rate of return because of the risks involved in foreign currency exchanges. Petitioner's three time deposit accounts carried interest rates of 33.9%, 31.4% and 32.75%, respectively. Banamex's dollar savings accounts carried a much lower rate of interest. Petitioner selected the account with the highest rate of return — and assumed the greatest risk of foreign currency exchange fluctuation. The brochure also clearly stated that (a) the time deposit accounts were to be opened directly with a Banamex branch office in Mexico either in person or through the mail; (b) Banamex was indifferent as to which currency a depositor sent to them but that all currencies, other than pesos, had to be converted into pesos in order to be deposited in a peso account; (c) interest and principal payments were to be made payable in pesos, but Banamex would convert them into the currency of the depositor's choice at the prevailing exchange rates upon request; (d) interest and principal could be mailed directly to the depositor in either dollars or pesos at the depositor's request and (e) for the convenience of the depositor, Banamex would deposit interest as it accrued and principal upon maturity in a Banamex peso savings account or checking account, or it would convert the pesos into dollars and deposit them into a dollar savings or checking account if and only if the depositor desired such an arrangement. A foreign currency exchange was in no sense a part of the contractual arrangement which set the terms of the deposit.

On September 18, 1981, petitioner sent a \$20,000 check to Banamex's Tijuana branch to be converted by Banamex, as an accommodation to petitioner, into pesos and thereafter deposited *in pesos* in a six-month peso-denominated time deposit account (bearing 33.9% interest) to be maintained in Tijuana. Banamex honored petitioner's instructions, made the foreign currency exchange, opened the account for petitioner, and thereafter maintained the account, *all in Tijuana*.³ Further in accordance with his instructions, Banamex thereafter made monthly interest payments to petitioner on the account by taking the amount of monthly interest payable to him in pesos, converting that amount into dollars, and then mailing to him from Mexico the designated amount in dollars. The amount of the dollar payments fluctuated depending upon the currency exchange rate prevailing on the date of payment.

The foregoing procedures were also followed by petitioner and Banamex in connection with two later accounts. On November 16 and December 21, 1981, respectively, petitioner sent additional \$20,000 checks to Banamex's Tijuana branch to be converted by Banamex into pesos and then deposited in pesos in ninety-day peso-denominated time deposit accounts (bearing, respectively, 31.4% and 32.75% interest) to be maintained in Tijuana. As with his earlier account, Banamex fully honored petitioner's instructions with respect to each of these subsequent accounts.

For several years prior to petitioner's deposits, the Banco de Mexico, Mexico's central bank which is roughly

³By express contractual agreement signed by petitioner, his time deposit accounts were maintained in Mexico at the Tijuana branch of Banamex. The interest on these accounts was payable at Tijuana as it accrued on a monthly basis and the principal also was payable at the branch (*e.g.*, in Tijuana) upon expiration of the fixed term.

equivalent to the Federal Reserve Bank in the United States, had intervened in the Mexico money markets to maintain a stable value relationship between the United States dollar and the Mexican peso. On February 18, 1982, the Banco de Mexico without warning ceased its intervention, thus letting the peso float in relation to the dollar. The peso devalued sharply in relation to the dollar.

As a result of the devaluation, when petitioner's time deposit accounts matured and the principal of his deposited funds were, at his request, converted from pesos back into dollars and returned to him, he received less than the \$20,000 he had originally sent for deposit in pesos in each of the accounts. Petitioner's losses resulted entirely from the foreign currency exchange, and were totally unrelated to Banamex's handling or maintenance of the accounts, to the financial stability or solvency of Banamex, and to the adequacy of the Mexican bank regulatory system. The dollar sums returned to him were equal to the principal sums, *in pesos*, originally deposited by him into each account, plus whatever interest sums, *in pesos*, had not previously been converted into dollars and mailed to petitioner.

The courts below acknowledged that petitioner's transactions with Banamex were common banking, deposit-taking transactions, materially indistinguishable from those undertaken daily by U.S. domestic banks.⁴ The courts likewise expressly found that depositors in Mexican banks are afforded similar — and in many instances greater — protections than their counterparts in domestic banks.⁵ Finally, those courts expressly found that the

⁴549 F.Supp. at 842 (Appendix at 25-26); 739 F.2d at 1459, 1461 (Appendix at 4, 10-11).

⁵549 F.Supp. at 853 (Appendix at 58) ("In this case it is not contested that Mexico thoroughly regulates its banks. . ."); 739 F.2d at 1462 (Appendix at 15-16).

Mexican regulatory system has worked well and resulted in a stable and secure banking industry. Indeed, those courts expressly found that no Mexican bank has become insolvent or otherwise defaulted on its deposit obligations for the past 50 years.⁶

Petitioner was thus assured by Mexican law, as were all depositors in Mexican banks, that he would be guaranteed the return of his principal, plus interest, in pesos — the currency in which his accounts were denominated. This guarantee was *without dispute* fully satisfied by Banamex. Only the external economic factor of devaluation — a matter beyond the control of Banamex and of which petitioner was well aware⁷ — led to petitioner's "loss."

⁶549 F.Supp. at 853 (Appendix at 58) ("In this case it is not contested that . . . no Mexican bank has become insolvent in fifty years."); 739 F.2d at 1462 (Appendix at 15-16).

⁷Contrary to petitioner's intimations, the district court expressly did not make any finding that Banamex had in any way defrauded petitioner. Indeed, on the record, no such finding would be supportable. Adequate disclosure had been furnished from a number of sources. A highly publicized devaluation of the peso had taken place in 1976. The peso had declined steadily against the dollar in at least the six month period preceding the February 18, 1982 devaluation. Such information, including related stories discussing the risks of foreign currency loss attendant to opening peso accounts, were carried in most daily newspapers, including the *San Francisco Examiner*, a paper read regularly by petitioner. Moreover, petitioner was personally aware of the devaluation risk at least at the time of his last two deposits — in November and December 1981. In September, he was credited with 499,600 pesos for his \$20,000 check; in November 1981, 514,800 pesos for \$20,000; and in December 1981, 520,400 pesos for \$20,000. Despite the peso's steady, consistent decline in value relative to the dollar, petitioner nevertheless chose to assume the risk of further devaluation of the peso by opening two new peso accounts. Finally, in addition to the general media information available, in the brochure which Banamex sent to petitioner *at his request* (see note 2, *supra*), Banamex expressly informed petitioner that the peso was a floating currency, "which means that the rate of exchange between the peso and the currency you

ARGUMENT

I

THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS AND THE STATUTORY FRAMEWORK APPLICABLE TO THE ISSUES IN DISPUTE.

A. The Ninth Circuit Correctly Applied The Test Enunciated In *Marine Bank v. Weaver* To The Facts In This Case.

The Ninth Circuit (by Judge Duniway, unanimously joined by Judges Wallace and Pregerson) performed a two-step analysis in concluding that Banamex's time deposit accounts were not securities: *First*, the court held that the "contextual analysis" test articulated by this Court in *Marine Bank v. Weaver*, 455 U.S. 551 (1982) applied with equal force to certificates of deposit/time deposit accounts issued by foreign banks. (Appendix at 15). *Second*, the court carefully examined the record below and concluded that Mexico's bank regulatory system "abundantly protected" Banamex's depositors against the risk of insolvency, thereby satisfying the *Weaver* test. (Appendix at 15-16).

As discussed hereafter, the Ninth Circuit's analysis — and conclusion — is supported not only by the reasoning of the Supreme Court in *Weaver*, but also by prior Supreme Court case law and the legislative framework governing securities and banking transactions. Likewise, the purported distinctions that petitioner now seeks to raise between the facts in this case and the facts in

request your interests [sic] and principal to be paid to you it could vary upwards or downwards between the time you purchase your Time Deposit and maturity."

Weaver are either contrary to the record below or immaterial to the *Weaver* test. The Ninth Circuit's decision, therefore, does not merit review by this Court.

In *Weaver*, this Court held that a six year, \$50,000 certificate of deposit issued by a United States bank was not a "security" under the antifraud provisions of the Securities Exchange Act of 1934 (the "1934 Act").⁸ The Court reaffirmed that the test for determining whether an instrument is a security "is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect." *Id.* at 556 (quoting from *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 211 [1967]).

Applying this contextual analysis, the Supreme Court in *Weaver* rejected both of the reasons advanced by the Third Circuit for holding that the certificate of deposit before it was a security.⁹ The Court examined the contents of the certificate of deposit in question, the purposes it was intended to serve and the factual setting as a whole in holding that, in the context of a customary banking

⁸As the Ninth Circuit recognized, *Weaver* applies with equal force to the definition of "security" under § 2(1) of the Securities Act of 1933 (the "1933 Act"). (Appendix at 11-12).

⁹The Court first rejected the Third Circuit's reasoning that a certificate of deposit was analogous to withdrawable capital shares in a savings and loan association because, unlike such shares, the certificate paid a fixed rate of interest and the depositor did not share in any profits. 455 U.S. at 557. Thus, according to the Court, the bank issued certificate of deposit fell outside the scope of "the ordinary concept of a security." 455 U.S. at 557. The Court also rejected the second reason advanced by the Third Circuit — *to wit*, that, from an investor's point of view, a certificate of deposit is no different than any other long term debt obligation — on the ground that due to the comprehensive set of federal regulations which governed the issuing bank, "the purchaser of the certificate of deposit is virtually guaranteed payment in full." *Id.* at 558.

transaction involving a federally regulated bank, the bank certificate of deposit was not a security. The Court concluded (at 559) that:

It is unnecessary to subject issuers of bank certificates of deposit under the antifraud provisions of the federal securities laws since the holders of bank certificates of deposit are abundantly protected under the federal banking laws.

The Ninth Circuit correctly concluded that the test articulated by this Court in *Weaver* applies to certificates of deposit issued by foreign banks. Both the specific holding and contextual analysis of *Weaver* support the Ninth Circuit's conclusion. Thus, if, as here, a foreign time deposit account contains provisions for payment of fixed interest and non-participation similar to those present in *Weaver*, the foreign time deposit account should not be found to be a security. Likewise, as long as the depositor is guaranteed repayment in full, as here, the source of the regulations that give rise to that guarantee should not matter. It is the overall effect of the government regulations and not their particular terms or their source which removes the risks that the securities laws were designed to protect against.¹⁰

¹⁰Thus, in *Weaver* the Court did not purport to limit its holding to certificates of deposit issued by federally regulated U.S. banks, but rather emphasized that "[e]ach transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole." 455 U.S. at 560 n.11. In addition, the Court relied upon its holding in *Teamsters v. Daniel*, 439 U.S. 551 (1979) that the protection afforded members of noncontributory compulsory pension plans under ERISA removed any need for additional protection under the securities laws without undertaking a detailed comparison of the terms of the two acts. Similarly, in *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 857 n.24 (1975), the Court held that New York State's regulation and oversight of the housing cooperative involved effectively removed any risk of insolvency without requiring equivalent federal protection.

And yet, petitioner claims that certain factual distinctions between this case and *Weaver* require a different result here — so-called factual distinctions expressly found against him in the courts below. In particular, he claims that the terms of Banamex's time deposit accounts differ in material respects from the account in *Weaver* and that the alleged presence of advertising and the solicitation of deposits in this case was absent in *Weaver*.¹¹ Petitioner is mistaken on both counts.

The certificate of deposit issued in *Weaver* and the time deposit accounts issued by Banamex in the present case do not differ in any material respects — a fact that both the district court and Ninth Circuit acknowledged. Indeed, the *only* significant difference in content and purpose between the instrument in *Weaver* and those issued by Banamex is the short term nature of the Banamex instruments (90 days to six months) as opposed to the long term nature of the instrument in *Weaver* (six years).¹² If anything, this factor indicates that the risk of

In each case, different regulations were found to already provide adequate protection against the risks which the securities acts address, so that extension of the federal securities laws would serve no general purpose. *Daniel*, 439 U.S. at 570.

¹¹Petition at 11, 20.

¹²The Banamex accounts share at least the following similarities with their domestic counterparts: (1) both deposits have a fixed term; (2) both deposits pay a fixed rate of interest for their entire term and the rate is fixed as of the date of the first deposit; (3) interest is paid monthly as it accrues without compounding; (4) upon maturity the principal is returned to the depositor; and (5) depositors have no voting rights or rights of profit participation. The "distinctions" that petitioner seeks to draw (Petition at 11) do not withstand scrutiny: (1) neither domestic nor foreign certificates of deposit give rise to special deposits over which the depositor exercises "dominion"; (2) domestic certificates of deposit can be either negotiable or non-negotiable; (3) this Court in *Weaver* clearly rejected the argument that pledging a certificate of deposit had anything to do with its status as a security, 455 U.S.

loss from insolvency was *less* in the present case than in *Weaver*.¹³

Moreover, even *assuming* advertising or solicitation of the magnitude that petitioner claims, such activities were certainly no greater than the widespread advertisements of domestic banks offering time deposit accounts at competitive rates of interest.¹⁴ Petitioner would convert customary banking, deposit transactions into the sale of a security simply because of allegations of such advertising. However, even in the face of allegations of direct, fraudulent solicitations by bank employees in *Weaver*,¹⁵ this Court refused to hold the certificate of deposit to be a security. It is inconceivable that the result in *Weaver* would have been different if the plaintiffs had alleged or proved that the bank engaged in widespread advertising — as Marine Bank undoubtedly did — to obtain deposits.¹⁶

at 559 n.9; and (4) there is no mandatory requirement that domestic banks allow early withdrawal of time deposits (except upon the death or incompetency of the owner), and the only penalties prescribed are minimum penalties. 12 C.F.R. § 217.4(e).

¹³Additionally, a comparison of the total deposits and assets of Banamex versus Marine Bank leads to such a conclusion. As of the end of 1981, Banamex had more than 13 billion U.S. dollars in deposits and more than 17 billion U.S. dollars in assets. *The Latin American Times*, p. 14 (Aug. 1982). By contrast, Marine Bank had only approximately 383 million U.S. dollars in deposits and 447 million U.S. dollars in assets at the end of 1980. *Moody's Bank & Finance Manual*, Vol. I, p. 1814 (1982).

¹⁴Indeed, on the record below, petitioner can hardly contend that Banamex's purported advertising and solicitation equal that of domestic banks.

¹⁵455 U.S. at 553; *see also, Weaver v. Marine Bank*, 637 F.2d 157, 160 (3d Cir. 1980).

¹⁶Similarly, it is immaterial whether Banamex's time deposit accounts were described as "investments" in the brochure provided to petitioner.

Perhaps recognizing that any attempt to create material factual distinctions in the bank accounts justifying a different result here than in *Weaver* must fail, petitioner next contests the adequacy of Mexico's banking regulations. The Supreme Court is thus asked to undertake another *fact finding* task that has already been performed by the courts below and resulted in a conclusion contrary to petitioner's position.¹⁷ Such fact finding is certainly not one worthy of this Court's review.

Clearly, not all "investments" are securities; an insurance policy, for example, may be advertised and sold as a good investment, but it is still an insurance policy for purposes of the federal securities laws. Numerous decisions by this Court and, in particular, *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 850 (1975), hold that the label given to an instrument is not dispositive.

¹⁷The Ninth Circuit found that the Mexican banking regulatory scheme is just as comprehensive as, and in many areas more protective than, the U.S. federal system. 739 F.2d at 1463 (Appendix at 22-24). See generally, United Mexican States, General Law of Credit Institutions and Auxiliary Organizations (1982) ("Credit Law"), Articles 2, 8 and 11. Deposits in Mexican banks are protected by reserve requirements which cover 100% of the bank's paid-in capital and up to 50% of the bank's liabilities, including deposits. *Id.* Articles 8, 94. By contrast, a federally chartered bank in the United States need maintain reserves of only 3% against time deposits of less than thirty months. 12 U.S.C. § 461; 12 C.F.R. § 204. Mexican banks, just like domestic banks, are required to make regular reports to government agencies, although Mexican banks must publish their financial statements on a monthly basis (Credit Law, Article 95) rather than the quarterly statements required under United States regulations. 12 U.S.C. §§ 161, 324, 1817. Both Mexican and domestic banks are subject to government inspection (Credit Law, Article 95; 12 U.S.C. §§ 481, 483, 1820(b)), and both regulatory systems control the advertising by banks with respect to their deposit contracts. Credit Law, Article 93; 12 C.F.R. §§ 217.6, 329.8. The Mexican banking regulations concerning reserve, reporting, inspection and advertising controls provide the functional equivalents of federal regulations in each instance.

Petitioner nevertheless argues that Mexico's banking regulations did not provide insurance coverage for certificates of deposit similar to that provided by the FDIC, thereby creating a "material" distinction from *Weaver*. However, the existence of FDIC insurance was only *one* of the factors considered by this Court in *Weaver* in assessing the historical record of protection afforded by government regulations to depositors in failing banks.¹⁸ The decision in *Weaver* nowhere suggests that, notwithstanding all the other federal regulations which govern domestic banking operations, the FDIC's insurance limits provide the *only* guarantee against insolvency. To the contrary, the Court expressly noted the existence of a strong government policy in favor of protecting depositors by even paying for the portions of their deposits above the amount insured. 455 U.S. at 558.¹⁹

¹⁸If deposit insurance had been a prerequisite for finding repayment of a certificate of deposit to be "virtually guaranteed" in *Weaver*, then, following petitioner's analysis, a certificate of deposit for \$100,000 issued by a domestic bank would *not* be a security because the deposit is fully insured, whereas a certificate of deposit for \$2,000,000 issued by the same bank would be a security because only 5% of that deposit would be insured. See 12 U.S.C. § 1821(a)(1). Since FDIC insurance insures a depositor up to a maximum of \$100,000 on each deposit, thus, a deposit of \$100,000 or under is fully insured against the bank's insolvency, while a \$2,000,000 deposit would be protected only up to 5% of that amount. This Court did not concern itself about this point in *Weaver*, even though at the time that suit was brought therein only 80% of the deposit at issue was subject to FDIC insurance.

¹⁹Mexico has the same policy, and has been just as — if not more — effective in implementing that policy. Indeed, the comprehensive regulation and oversight of Mexico's banking industry had historically provided *greater* protection against bank failure than FDIC insurance has provided in the United States. Although no Mexican bank has become insolvent in fifty years (Appendix at 16), by contrast, 722 United States banks failed in the period from 1934 to 1981, 136 of which were not insured by the FDIC. See 1981 Annual Report, Federal Deposit Insurance Corporation, Vol. I, p. 70.

Finally, petitioner argues that the Mexican regulatory system is *per se* inadequate because it furnishes no guarantee against the risk of currency devaluation sustained by him. This argument ignores at least two material, undisputed facts:²⁰ *first*, the same risk existed in connection with the certificate issued in *Weaver* and is inherent when any person owns a deposit account in a currency different from that in which he normally deals; and, *second*, the same devaluation risk is not covered or protected against by U.S. federal regulations. Both of these facts were properly recognized by the Ninth Circuit in its decision.²¹ Moreover, as in the present case, foreign currency exchange fluctuations result from a complex confluence of factors, all of which are influenced as much by economic conditions external to the foreign country as those which are internal. To hold an individual issuer, such as Banamex, responsible under the securities laws for the result of external economic factors and governmental acts beyond its control would be improper.

External economic risks — such as inflation, currency fluctuations or governmental intervention — have never been considered by this Court as appropriate criteria for determining whether an instrument is a “security.” Such risks are inherent in all transactions. Thus, the Court in *Weaver* did not inquire whether each dollar to be received by the Weavers in 1984 would be less valuable — due to inflation, devaluation, or otherwise — than each dollar they deposited in 1978.²² Such risks were wholly outside

²⁰It likewise ignores the fact that, in *Weaver*, the Court emphasized that “Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud.” 455 U.S. at 556.

²¹739 F.2d at 1462 (Appendix at 17).

²²While the effect of devaluation on this Court’s analysis in *Weaver* must rest on hypothetical examples, the effect of inflation can be calculated exactly. The 6-year certificate of deposit in *Weaver* was

the control of Marine Bank and their consideration would have done nothing to advance the Court's contextual analysis.²³

In sum, the distinctions which petitioner seeks to draw between the present action and *Weaver* do not withstand scrutiny. As in *Weaver*, (a) the subject transactions arose in the commercial context of banking, (b) the transactions were regulated by an extensive and thorough banking regulatory system, and (c) these factors "virtually guaranteed payment in full" to petitioner. 455 U.S. at 558. Whether applying the specific holding of *Weaver* (that bank certificates of deposit are not securities) or its contextual analysis test, there is no conflict with *Weaver* present in this case that would warrant a granting of the petition.

B. The Ninth Circuit's Decision Is Not Only Fully Consistent With And A Proper Application Of *Weaver*, But It Is Also Consistent With The Statutory Framework Applicable to the Issues in Dispute.

Petitioner argues that the Ninth Circuit's decision is at odds with the Securities Act of 1933 (and its purposes) (the "1933 Act") as well as the International Banking

issued in 1978 and paid interest at the rate of 7½ % per annum. Inflation averaged 10.9% per annum from 1978 through 1981 (Economic Report of the President, February 1983 at 225), so that the value of the Weavers' deposit actually diminished, even after interest is taken into account. This Court never suggested in *Weaver* that the absence of federal regulations to guarantee against losses due to inflation was material to the security status of the certificate of deposit in issue.

²³Other courts have also recognized that the risk of devaluation in the unit of payment is not an appropriate criteria for evaluating the nature of an instrument as a "security." See, e.g., *Noa v. Key Futures, Inc.*, 638 F.2d 77, 79-80 (9th Cir. 1980); *Berman v. Dean Witter & Co.*, 353 F.Supp. 669, 671 (C.D. Cal. 1973).

Act of 1978 ("IBA"). Again, petitioner is mistaken in his analysis.

The legislative history behind the 1933 Act clearly reflects an intent to recognize and codify the difference between a transaction in securities and ordinary banking activities.²⁴ When President Roosevelt sent to Congress the bill that was later to become the 1933 Act, he expressed his view that bank regulation would be embodied in separate regulation. 77 Cong. Rec. 937 (1933).²⁵ Indeed, a major purpose of the Banking Act of 1933, ch. 89, 48 Stat. 162 ("Glass-Steagall Act") was to divorce the banking and securities businesses.²⁶ Congress clearly

²⁴Contrary to petitioner's assertion at page 25 of his Petition, the statutory exemption of domestic bank *securities* from the registration provisions of the 1933 Act in no way represents a congressional intent to distinguish between domestic and foreign *bank deposits*. Rather, it evidences the contemporary attitudes concerning the difference between securities and banking transactions, and congressional recognition that the sale of domestic banks' *stock* would be regulated under a separate federal banking act. See note 28, *infra*.

²⁵This Court has recognized such a distinction between banking and securities transactions on numerous occasions. *E.g.*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 157 (1976); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194-195 (1976).

²⁶*Federal Reserve System v. Investment Co. Trust*, 450 U.S. 46, 61 (1981). Section 16 of the Glass-Steagall Act allows a national bank to exercise "all such incidental powers as shall be necessary to carry on the business of banking", including "receiving deposits", but it also provides that "the business of dealing in securities and stock by the association . . . [shall be] in no case for its own account." 12 U.S.C. § 24. Conversely, § 21 of the Glass-Steagall Act prohibits securities firms from engaging in the business "of receiving deposits subject . . . to repayment upon presentation of a . . . certificate of deposit."

intended to draw a line with the issuance of certificates of deposit on the one side and the sale of securities on the other side.²⁷ Congress could not have drawn the line in this fashion if certificates of deposit issued in the normal course of banking business were securities.²⁸

Congress also maintained this distinction in its recent amendments to the definitions of "security" under the federal securities acts. In October 1982, the definition of "security" in the 1933 and 1934 Acts was amended by Congress to include "any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof)." 15 U.S.C. §§ 77b(a)(1), 78c(a)(10). The juxtaposition of the words "security" and "certificate of deposit" in the amended definition was prompted by the holding in *Weaver*.²⁹ Significantly, although Congress juxtaposed the words "security" and "certificate of deposit" in the amended definitions under the 1933 and 1934 Acts, Congress also accommodated the SEC's historical interpretation of security under § 2(a)(36) of the Investment Company Act of 1940 by defining "security" in relevant part thereunder to read

²⁷*Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 157 (1976). This Court also noted in *Radzanower* that, "[w]hile Congress did examine problems stemming from the relationship of banks and the securities business in the early 1930's . . . it dealt with those problems in comprehensive legislation dealing only with banks." 426 U.S. at 155. n. 11.

²⁸The legislative history concerning the exemption of domestic bank securities from the registration provisions of the 1933 Act clearly indicates that in exempting bank securities, Congress was concerned only with capital stock issued by banks, not certificates of deposit. See Hearings on H.R. 4314 before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 1st Sess. at 31 (1933).

²⁹H.R. Rep. No. 97-626, Part I, 97th Cong., 2d Sess. 10 (1982).

"... option ... on any security (including a certificate of deposit)." ³⁰

None of these statutory amendments distinguishes between U.S. and foreign bank certificates of deposit. This is consistent with both the general banking and securities legislative framework discussed above and with the IBA. 12 U.S.C. §§ 3101-3107. In the IBA, Congress recognized that the U.S. banking system does not operate in a vacuum unaffected by international banking, isolated from banks in other parts of the world. Indeed, the legislative history reveals an intent to encourage "free and open international banking":

Free and open international banking enhances international trade and fosters democratic principles by providing for open and competitive markets. American banks abroad can and should play a significant role in supporting American Exports. ³¹

At a minimum, the position advanced by petitioner herein would, if approved by this Court, disrupt the "free and open international banking" envisioned by Congress and would result in invidious discrimination against foreign banks not in keeping with the legislative mandate in the IBA or the judicial mandate of *Weaver*. ³²

³⁰15 U.S.C. § 80a-2a(36), as amended by Pub. L. 97-303, 96 Stat. 1409 (1982). Banks and similar institutions are expressly excluded from the scope of the Investment Company Act. 15 U.S.C. § 80a-3(c)(3).

³¹S. Rep. No. 1073, 95th Cong., 2d Sess. 18 (1978).

³²The IBA provides for the operation of "federal" agencies or offices by foreign banks and was intended to provide foreign banks with "national treatment" under which "foreign enterprises ... are treated as competitive equals with their domestic counterparts." 1978 Sen. Rep. No. 1073, 95th Cong., 2d Sess. 2 (1978). The House Report contains the following discussion relating to foreign banks' securities activities:

Both H.R. 7325 and the bill adopted by the subcommittee, H.R. 10899, required that, after 1985, foreign banks with banking

C. The Ninth Circuit's Decision Is Fully Consistent With The Results Mandated Under Other Traditionally Applied Supreme Court Decisions.

The Ninth Circuit properly applied the *Weaver* test in the pending case. Even assuming *arguendo*, however, that another test should instead be applied, the result in this case would be the same. For example, in determining whether the context of a given transaction and the nature of a given instrument warrant application of the securities laws, courts have often applied the standard articulated by the Supreme Court in *S.E.C. v. W. J. Howey Co.*, 328 U.S. 293 (1946).³³ Application of the *Howey* test to the present case fully supports the conclusion reached by the Ninth Circuit on the basis of *Weaver*. Banamex's time deposit accounts are not securities — such customary bank deposit transactions do not involve an investment of money in a common enterprise with the expectation of profits resulting from the managerial efforts of others. Indeed, in factual contexts indistinguishable from those in the present case, the courts in *Canadian Imperial Bank*

operations limit the business of their securities affiliates to activities related to the sale and distribution of securities outside the United States.

H.R. Rep. No. 910, 95th Cong., 2d Sess. 10 (1978). See 12 U.S.C. § 3106(c). If Congress had viewed the acceptance of foreign currency deposits by foreign banks as involving the sale and distribution of securities, this statement would be a contradiction. Congress would not pass a bill regulating the acceptance of deposits in the U.S. by foreign banks, yet at the same time exclude activities relating to the sale and distribution of securities if it considered such deposits to be securities.

³³This test has most frequently been characterized as a four-part test: (a) investment in (b) a common enterprise with (c) an expectation of profits (d) primarily through the efforts of a third party. *Id.* at 299. In *United Housing Foundation, Inc. v. Forman*, *supra*, the Court acknowledged that the *Howey* "test, in shorthand form, embodies the essential attributes that run through all of the Court's decisions defining a security." 421 U.S. at 852.

of *Commerce v. Fingland*, 615 F.2d 465, 469-70 (7th Cir. 1980) and *Hendrickson v. Buchbinder*, 465 F.Supp. 1250, 1252 (S.D. Fla. 1979) applied the *Howey* test and concluded that accounts in foreign banks similar to those involved herein were not securities.³⁴

II

THE NINTH CIRCUIT DECISION IS CONSISTENT WITH AND DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

Petitioner seeks to create conflicts between the Ninth Circuit's decision and decisions by other circuit courts where no conflicts exist. This is the *first* circuit court decision to apply *Weaver* in the context of a foreign bank

³⁴Numerous other lower courts have also reached the same conclusion with respect to accounts issued by domestic banks through application of the *Howey* test. See *Bellah v. First National Bank of Hereford, Texas*, 495 F.2d 1109, 1114-15 (5th Cir. 1974) (a bank certificate of deposit issued in exchange for currency is not a security because currency is not a security and because a bank certificate of deposit has none of the investment characteristics necessary under the *Howey* test); *Burrus, Cootes and Burrus v. MacKethan*, 537 F.2d 1262, 1264-65 (4th Cir.), *on reh'g sub nom.* 545 F.2d 1388 (1976), *cert denied* 434 U.S. 826 (1977) (domestic bank issued certificate of deposit held not to be a security because it is a commercial rather than investment transaction); *Ayala v. Jamaica Savings Bank*, 1981 CCH Fed. Sec. L. Rptr. ¶98,041 (E.D. N.Y.); *Hamblett v. Board of Savings & Loan Associations, etc.*, 472 F.Supp. 158, 166 (N.D. Miss. 1979). Nevertheless, citing *Tcherepnin v. Knight*, 389 U.S. 332 (1962), petitioner argues that unless an instrument offered as an "investment" is expressly exempted from the security laws it is a security. (Petition at 20.) Not only is this not the holding in *Tcherepnin* (see, e.g., 389 U.S. at 336), but this Court also clearly rejected such literal interpretations of the securities definitions by emphasizing the need to examine the context in which the transaction occurs in *Weaver*. 455 U.S. at 556. See also, *United Housing Foundation, Inc. v. Forman*, 421 U.S. at 852.

or, indeed, in any banking context.³⁵ Thus, *Weaver* has not yet had a full opportunity to “percolate” through the district and circuit court levels. It would be an unwise utilization of this Court’s precious time to review the first circuit court decision applying *Weaver* — especially where there is no demonstration that the Ninth Circuit analysis *and conclusion* will not be followed elsewhere. Indeed, the decision below is fully consistent with, and supported by, prior circuit court decisions.³⁶

Petitioner’s only hope for the demonstration of a circuit conflict rests in his strained reading of the Fifth Circuit decision in *Meason v. Bank of Miami*, 652 F.2d 542 (5th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982) — a pre-*Weaver* decision.³⁷ There, the court applied a

³⁵The Third Circuit considered what effect, if any, this Court’s decision in *Weaver* would have on its decision that the sale of all or part of a business effected by the transfer of stock is a sale of a security under the Securities Acts in *Ruefenacht v. O’Halloran*, 737 F.2d 320, (3rd Cir. 1984). In dictum, the circuit court explained that *Weaver* had applied a two-part analysis paralleled to that performed in *Forman*, first ascertaining whether the certificate of deposit was a “note” or “withdrawable capital share” and only then turning to whether the separate agreement was an “investment contract” under the *Howey* test. 737 F.2d at 338.

³⁶As discussed above, in a pre-*Weaver* decision, the Seventh Circuit in *Canadian Imperial Bank of Commerce v. Fingland*, *supra*, applied the *Howey* test in holding “that certificates of deposit issued by a Bahamian bank were not securities.”

³⁷*Securities & Exch. Com’n v. First American Bank & T. Co.*, 481 F.2d 673, 678 (8th Cir. 1973), relied on by petitioner (Petition at 24), contains no discussion of the nature of the “passbook savings accounts” which the court lumps together with “capital notes” and “certificates of investment” that were offered by the defendant trust company, which company was not even a “banking institution” under the applicable state law. Obviously, this case is not authority for the proposition that certificates of deposit issued by a bona fide bank in the normal course of its banking operations are securities.

"commercial-investment" variant of the *Howey* test in holding that a plaintiff's *allegations* that certificates of deposit issued by a Grand Cayman Island "shell" bank were securities were not wholly insubstantial or frivolous. 652 F.2d at 546.

But, clearly, the result in *Meason* would have been the same if the Ninth Circuit test here before the Court had been applied by the Fifth Circuit. The facts in *Meason* indicate that the issuing Grand Cayman "bank" was a "shell" (rather than a *bona fide*, internationally recognized bank); it was inadequately capitalized and engaged in speculative lending practices (presenting a clear risk of insolvency); and the government regulations in effect were inadequate (indeed, non-existent). 652 F.2d at 544-45.³⁸ Under the *Weaver* test as applied by the Ninth Circuit below, therefore, the unusual circumstances present in *Meason* would have mandated that the time deposits in that case were securities requiring the protection of U.S. securities laws.

³⁸Some nations, such as the Grand Cayman Islands, maintain a dual banking system, which permits one class of banks to conduct full banking operations within the nation, but which limits another class of banks to only offshore deposits and business. Under the Grand Cayman banking scheme, a bank with a "Class A" license may conduct business within the Cayman Islands. A bank with a "Class B" license, on the other hand may maintain an office in the Islands but must conduct all of its business outside of the Islands. Banks and Trust Companies Regulations Law, § 4(8). Furthermore, a Class B licensee may choose between having an unrestricted license or a restricted license, which requires a much lower minimum paid up capital. At the time of its organization, a Class B restricted licensee must provide a name of all of those companies and people from which it will solicit or receive funds. The Banks and Trust Companies Regulations 1968, Schedule, Part II, § 8. The "bank" in *Meason* was a "Class B" bank. Mexico has no such dual system, and Banamex in any event can hardly be deemed a "shell."

III

THE FACTUAL CONTEXT OF THIS CASE SUPPORTS THE CONCLUSION REACHED BY THE NINTH CIRCUIT AND DOES NOT JUSTIFY REVIEW BY THIS COURT.

Two additional material factors contribute to — indeed mandate — the conclusion that this case is not a proper one for Supreme Court review. *First*, before the Ninth Circuit, each of the *amicus* parties — including the Securities and Exchange Commission (“SEC”), Federal Deposit Insurance Corporation (“FDIC”), Institute of Foreign Bankers, and an Organization of Mexican Banking and Financial Institutions — urged reversal of the district court opinion and *articulated a position that petitioner was not entitled to any recovery under the 1933 Act because, at the least, he did not suffer any recoverable damage under that law. E.g., SEC Amicus Brief at 19. Second*, now that Banamex is a nationalized institution and, hence, a part of the Mexican government, this Court’s review and potential reversal of the Ninth Circuit decision could create significant adverse international repercussions, not only within the international banking community but also in the context of sensitive relations between the U.S. government and the government of the United Mexican States.

A. There Was Agreement Between the Parties Below, Except Petitioner, that He Was Entitled to No Recovery Under the 1933 Act.

In the court below, the SEC and FDIC, in *amicus* roles, differed on what definitional test the Ninth Circuit should have applied, but did *agree* on two material points: that the district court decision should be reversed³⁹ and that

³⁹Contrary to petitioner’s assertion at pages 33 and 34 of his Petition, the SEC did not take the unqualified position that foreign bank time deposit accounts were securities. The SEC conceded that the vast

petitioner did not suffer any recoverable damage under the 1933 Act. Thus, petitioner is, at best, asking this Court to undertake a theoretical, advisory task.⁴⁰ In such a case, where *all parties* below (except petitioner) agree that petitioner is entitled to the recovery of *nothing* on the facts of this case, it would be improper for the Supreme Court to grant certiorari.

B. A Consideration of the Present Status of Banamex as an Instrumentality of the Mexican Government Warrants Denial of the Petition.

Petitioner argues that the Ninth Circuit's decision will somehow require lower courts to violate the act of state doctrine and otherwise embroil them in matters sensitive to international relations. This argument demonstrates a fundamental misunderstanding of the nature of the act of state doctrine and of the inquiry which the Ninth Circuit undertook in applying the *Weaver* test. More significantly,

majority of time deposit accounts — even foreign bank time deposit accounts — are *not* securities:

[T]he context of the transactions in which such instruments [foreign bank time deposit accounts] are purchased will generally place them outside the scope of the registration and antifraud provisions.

SEC Amicus Brief at 13.

⁴⁰Petitioner also makes much of the fact that the Ninth Circuit failed to give proper deference to the SEC's construction of the 1933 Act and, instead, followed this Court's enunciated test in *Weaver* as urged by Banamex, the FDIC and each other *amicus* party. The Ninth Circuit was confronted by conflicting positions between the two governmental agencies perhaps most concerned with the common banking transactions at issue herein — and, based on *Weaver*, chose to follow the position articulated by the FDIC. In so doing, the court rejected the SEC argument against application of *Weaver* and its advocacy of an amorphous "commercial-investment" dichotomy test that would have furnished no guidance to reviewing courts and that ignored applicable factors articulated in *Weaver*.

and contrary to petitioner's contention that factors of international relations between governments mandate review by this court and reversal by it of the Ninth Circuit decision, those factors strongly militate against any such review of that decision by this Court.

The act of state doctrine provides that a United States court will not adjudicate a politically sensitive dispute which would require the court to judge *the legality of a sovereign act* of a foreign state.⁴¹ Clearly, in assessing whether or not a foreign government's banking regulations provide adequate protection against nonpayment of time deposit accounts, a U.S. court would not be *adjudicating the legality* of any act by any foreign government.⁴²

This distinction between "adequacy" and "legality" is well-illustrated by the facts of the present case. Except for certain conclusory allegations of petitioner, no one has contested the efficacy of the Mexican bank regulatory system in virtually guaranteeing depositors against the risk of bank insolvency. Even the SEC conceded (at page 11 of its Amicus Brief below) that "Mexico's bank regulatory system is undoubtedly sophisticated and effective." Moreover, weighing evidence concerning foreign bank regulatory systems is no more difficult or sensitive than the well-established practice of assessing foreign *judicial* systems in order to determine if foreign judgments sought to be enforced in U.S. courts have been rendered

⁴¹*Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *see, also, Intern. Ass'n of Machinists, Etc. v. OPEC*, 649 F.2d 1354, 1358 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

⁴²The act of state doctrine is distinct from sovereign immunity, which goes to the jurisdiction of the courts. The act of state doctrine and the doctrine of sovereign immunity address different concerns and apply in different circumstances, and there is no basis for arguing that banking transactions involving foreign states automatically raise act of state considerations. *Cf. Intern. Ass'n of Machinists, supra*, 649 F.2d at 1360.

in accordance with U.S. notions of due process.⁴³ Indeed, the SEC itself has weighed the adequacy of foreign systems in issuing no action positions under the federal securities laws.⁴⁴ Objective proof of the efficacy of foreign bank regulatory systems in protecting depositors against the risk of insolvency is generally available — as it indisputably is in this case — through a review of the system's historical record in protecting depositors against bank failures (as well as through evidence of the existence of conventional reserve, reporting, examination and similar procedures).

More importantly, rejection of the Ninth Circuit's analysis, and the corresponding rejection of the *Weaver* approach in the foreign bank context, leads to the far more substantial and adverse "sensitive" presumption that *no* foreign bank regulatory system adequately protects its depositors, and that therefore foreign banks can bring themselves within the *Weaver* test *only* by submitting to U.S. federal bank regulation through the opening of federally regulated branches in the U.S. Such an adverse presumption becomes even more disturbing in the present case in view of the fact that Banamex has been nationalized and is now an instrumentality or agency of a foreign government, the United Mexican States. An attempt to regulate Mexican banks by extending the coverage of U.S.

⁴³See, e.g., Cal. Code Civ. Proc. § 1713.4 (providing that the enforcement of a foreign judgment is not conclusive on California courts); *Mattos v. Correia*, 274 Cal.App.2d 413 (1969); *Burt v. Burt*, 187 Cal.App.2d 36 (1960). See also, *Hilton v. Guyot*, 159 U.S. 113 (1895); *Sumitomo Corp. v. Parakopi Compania Maritima*, 477 F.Supp. 737 (S.D. N.Y. 1979); Restatement (Second) of Foreign Relations Law of the United States: § 40 (1965); *United States v. First National City Bank*, 396 F.2d 897 (2d Cir. 1968).

⁴⁴See, e.g., SEC No Action Letter, International H.R.S. Ind., Inc. (release date 4/16/84) (involving a reorganization to be approved by the Supreme Court of the Province of British Columbia).

securities laws would be an affront of the highest order to the integrity of the Mexican banking industry and its undisputedly effective, extensive regulatory system. The principles of comity would be unceremoniously rejected.⁴⁵

Adverse international repercussions would not only be felt in Mexico. Extending coverage of securities laws to foreign currency instruments such as the Banamex accounts could result in at least two additional adverse consequences. First, it would likely invite similar, potentially retaliatory treatment from the courts of foreign countries whose citizens have converted their own currencies to establish dollar deposits in U.S. banking institutions. In such circumstances, U.S. banks would be loathe to accept deposits from foreign sources, lest they establish themselves as guarantors of foreign currency fluctuations.

Second, and perhaps more importantly, such an extension could seriously jeopardize the provision of foreign banking services to U.S. persons, both corporate and individual. A deposit account is, itself, perhaps the most important banking service provided a customer, but it is also a necessary element to almost any other banking service available. Yet the effect of the position advanced

⁴⁵Not only would such an extension of the securities laws result in a rejection of comity and an affront to the Mexican government, but it would likewise negate the substantial efforts of the U.S. government in assisting Mexico in the restructuring of its foreign debt. Acceptance of petitioner's position could result in Banamex, and, hence, the Mexican government, being responsible for responding in damages to judgments entered on behalf of petitioner, and perhaps others similarly situated. The efforts of the U.S. government in restructuring Mexico's debt might have the anomalous result, therefore, of returning money, that was otherwise earmarked for use in Mexico for the repayment of Mexico's foreign debt, to the U.S. in the form of damages, compensating petitioner and others similarly situated for foreign currency exchange losses.

by petitioner would be to require foreign banks to register local currency deposit accounts with the SEC if they wish to continue making such accounts available to any U.S. persons. Failing such registration, foreign banks would subject themselves to becoming a guarantor of foreign exchange losses — as Banamex would become if petitioner's position were upheld — or to the risk of fraud actions under the U.S. securities laws for failure to disclose in writing before the opening of the deposit all significant risks of the country and the issuer. To avoid such risks, most foreign banks would choose not to register their deposits with the SEC and instead curtail their banking business with U.S. persons. Not only would the annual cost of registration be prohibitive for most banks, but the operational complications for assuring distribution of a prospectus to each potential U.S. depositor would be, in most instances, insurmountable.⁴⁶

The Ninth Circuit's decision represents the logical application of the *Weaver* test to foreign bank time deposit accounts. It fully protects U.S. depositors in such accounts; it is consistent with the history and purpose of the federal securities acts; and it involves no intrusion upon the acts of the foreign state.

⁴⁶For example, deposits are often established by wire on short notice and for maturities of one or two days by banks throughout the world in a variety of different currencies. Purchasers are engaged in banking transactions and, in making such deposits, rely on banking regulations and the customary practice of the banking industry. Provision of full disclosure prior to the establishment of such a deposit is not feasible, nor would such disclosure be of any significant interest to the depositors.

IV

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

DATED: November 28, 1984.

Respectfully submitted,

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